MEMORANDUM

TO: President Chuck Canterbury (Via Email Only)
FROM: Larry James
RE: FOP's Position on Judge Sotomayor for Appointment to the U.S. Supreme Court
FILE NO. 10093-27992
DATE: **June 8, 2009**

President Canterbury,

Judge Sotomayor was first appointed to the United States District Court for the Southern District of New York in 1991 by then President George H.W. Bush. She was next appointed to the Second Circuit Court of Appeals by President Clinton in 1998, where she remains today.

We pulled approximately 450 cases that she authored while sitting on the District Court for the Southern District of New York. We have reviewed summaries of most of those cases. There is no pattern to her rulings. She seems to be very careful to do a factual and case-by-case analysis in every instance. In regards to her rulings regarding unions and police issues, there, once again, is no clear pattern. Again, she seems to analyze each matter on a case-by-case basis, with a strong emphasis on the facts of that case.

The first case that seems to be getting a lot of attention is *Ricci v. Destefano*. The following is our summary of the same:

***Ricci v. Destefano*, 530 F.3d 87 (2nd Cir. 2008)**

Procedural History: Plaintiffs are appealing a judgment of the United States District Court for the District of Connecticut granting the Defendants' Motion for Summary Judgment on all counts.

Facts: The New Haven Fire Department administered written and oral examinations for promotion to Lieutenant and Captain. Forty-one (41) applicants took the Captain exam, where twenty-five (25) were white, eight (8) were black, and eight (8) Hispanic. Of the twenty-two (22) applicants who passed, three (3) were black and three (3) were Hispanic. Thirty-four (34) applicants passed the Lieutenant exam, of whom twenty-five (25) were white, six (6) black, and three (3) Hispanic. The test results revealed that no blacks would be eligible for promotion to Captain. After five (5) hearings, the Civil Service Board split two to two on the issue of certifying each exam. As a result of the Board's refusal to certify

the promotional results, seventeen (17) whites candidates and one (1) Hispanic candidate for promotional positions within the Fire Department sued the City and City officials, including the Civil Service Board members.

Plaintiffs alleged violations under Title VII, the Equal Protection Clause, the First Amendment and § 1985, and a common law claim of intentional infliction of emotional distress. This opinion is regarding whether the eighteen (18) candidates for promotion were discriminated against as a result of the Civil Service Board's decision not to certify the promotional results.

Holding: In a Per Curiam decision, the Court affirmed the decision of the Court below, granting the Defendants' Motion for Summary Judgment on all counts, with no independent opinion. In regard to the Title VII claim, the Court denied Plaintiffs' Motion for Summary Judgment because evidence of Defendants' desire to avoid making promotion based on a test with a racially disparate impact was insufficient for Plaintiffs to prevail on their claim.

The Court granted Defendants' Motion for Summary Judgment on the Equal Protection claim. The Equal Protection claim failed under the racial classification and disparate treatment arguments because all applicants took the same test and the result was the same for all because the test results were discarded and no one was promoted. In addition, Plaintiffs were unable to prove discriminatory intent on the part of Defendants.

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I also thought *Pappas v. The City of New York, et al*, from the United States Court of Appeals, Second Circuit, would be of interest. This case was decided on May 13, 2002. The appeal raised the question of whether a municipal police department may, without violating the First Amendment's guarantee of freedom of speech, terminate a police officer by reason of the officer's anonymous dissemination of bigoted racist anti-black and anti-Semitic materials. Officer Pappas brought a suit under 42 U.S.C. § 1983 against officials of the City of New York and the New York City Police Department, alleging that he was unconstitutionally fired from his employment by the police department by reason of his exercising rights of free speech protected by the First Amendment. The trial court granted the Defendants' Motion for Summary Judgment. The Court of Appeals affirmed by a two to one vote. Judge Sotomayor dissented in that decision.

The facts are that the New York Police Department charged Pappas with a violation of a departmental regulation. A disciplinary trial was held. Officer Pappas asserted at the trial that he had sent the materials because, "I was protesting, and I was tired of being shaken down for money by these so-called charitable organizations. It was a form of protest, just put stuff back in an envelope and send stuff back as a form of protest." The New York Police Department and Pappas stipulated that Pappas' conduct and the subsequent investigation had been the subject of new media reports from various news outlets. The Commission found Pappas guilty of violating a Departmental Regulation by disseminating defamatory materials through the mails, and recommending his dismissal from the force.

Judge Sotomayor dissented, arguing the following (as summarized by the majority):

> "Judge Sotomayor attaches great importance to the fact that Pappas did not occupy a "high level 'supervisory', 'confidential', 'policymaking' role' in the Police Department. She relies on the Supreme Court's statement in *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) that were "an employee serves no confidential, policymaking or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* At 390-97, 107 S.Ct. 2891, as well as our observation in *McEvoy v. Spencer*, 124 F.3d 92 103 (2d Cir.1997) that "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." (internal quotation marks omitted).

Again, this case demonstrates how strongly the Judge relies on the facts of an individual case, as opposed to an end result of policy-driven mindset.

There seems to be concern regarding Judge Sotomayor's comment of "a wise Latina woman versus that of a white male." The implication of her speech and those words would seem to correlate with the experience factor. In other words, do you take an officer straight out of the academy with all the Ivy League credentials, but with no street experience? The implication of that is that an officer or a military person who has all of the elite education but lacking in day-to-day experience is not going to be as wise as one with both. Irrespective of that debate and those arguments, I can find nothing that would suggest that Judge Sotomayor has been or will be a judge hostile to law enforcement from any perspective. That would also include labor-related issues. Based on her experience, I would think that she would be more sensitive to labor issues than many other prospective judges would be. Again, she is a fact-driven judge.

Please do not hesitate to call if there are questions.

Thank you.

LHJ/jg

cc: Jim Pasco (via email only)
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